

EXHIBIT 4

2008.11.03.txt

4032

1 8b3zvill
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 UNITED STATES OF AMERICA,

4 v. 05 Cr. 621 (RJS)

5 ALBERTO VILAR and GARY TANAKA,

6 Defendants.

7 -----x

8 November 3, 2008
9 9:05 a.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13 APPEARANCES

14 MICHAEL J. GARCIA
15 United States Attorney for the
16 Southern District of New York

16 BY: MARC LITT
17 JOSHUA KLEIN
17 BENJAMIN NAFTALIS
18 Assistant United States Attorneys

19 FAHRINGER & DUBNO, P.L.L.C.
19 Attorneys for Defendant Vilar
20 BY: HERALD PRICE FAHRINGER
20 ERICA DUBNO

21 WILSON, SONSINI, GOODRICH & ROSATI
22 Attorneys for Defendant Tanaka
22 BY: GLENN C. COLTON
23 JESSICA MARGOLIS

24
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4033

□ 8b3zvill
1 (In open court; jury not present)
2 THE COURT: Okay, please be seated.
3 All right, you just handed me a couple of Panamanian
4 documents. Is this something new?
5 MR. NAFTALIS: The translation, your Honor, is new.
6 The Spanish version was on your disk.
7 THE COURT: All right. And is there a dispute about
8 the translation?
9 MS. DUBNO: Yes, there is, your Honor.

Page 1

2008.11.03.txt

21 MR. COLTON: No, of course not, your Honor.
22 THE COURT: No. So what are you asking for?
23 MR. COLTON: Any statements, whether written or
24 verbal, that she made that are about the subject matter about
25 which she's going to testify, including statements she may have
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4190

8B3ZVIL5

1 made to U.S. Attorney's personnel, federal agents working on
2 this criminal case or to SEC personnel, given that she worked
3 for the SEC for a year or so before sort of changing agencies
4 for the purpose of this matter. And the work that she did for
5 the first year I believe I have a fair basis to infer until
6 told otherwise, forms at least in part the work that supports
7 her testimony that's upcoming in this trial.

8 So to the extent she e-mails about relevant facts; for
9 example, the government produced to us an e-mail exchange
10 between the AUSA's and Ms. Wraga about the GFRDA or alleged
11 GFRDA clients that she was considering and not considering in
12 various aspects. To me that's obviously properly produced in
13 3500. If a similar e-mail existed between herself and the SEC
14 lawyers for the work that formed the start of the eventual
15 product, that too, to me, should be produced.

16 MR. FAHRINGER: Your Honor?

17 THE COURT: Mr. Fahringer?

18 MR. FAHRINGER: May I add something to that, your
19 Honor?

20 THE COURT: Certainly.

21 MR. FAHRINGER: It seems to me that what we ought to
22 really go back to here is the primary impulse for the whole
23 concept that started as under the Jencks decision, the Jencks
24 Act and then 3500 was; that in the interest of justice and
25 fairness, a person taking the witness stand and testifying who

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

4191

8B3ZVIL5

1 has any reports, memos, notes or anything of that sort that
2 relates to the testimony, defense counsel should have it for
3 cross-examination. It's as fundamental as that. I'm not sure
4 how much working together as a team has to do with it.

5 If a doctor came in here and began to testify, I think
6 we would have a right to look at any notes that he might've had
7 that he made during the course of his examination.

8 So that our view is, your Honor -- and this is of
9 particular importance, any reports, any memoranda that she did
10 in the process of finalizing these charts, I think in some ways
11 may even be more important than e-mails back and forth, but
12 certainly we should have any written material that were used or
13 prepared by her in the process of producing a final product.

14 THE COURT: Well, I think there's two issues. One is
15 the issue as to whether or not these materials are in the
16 possession of the government. And the second issue is whether
17 or not these materials are, in essence, beyond the scope of the
18 testimony of the witness. They're separate inquiries, but I
19 think they're related.

20 I think the short answer should be that they should be
21 produced. I'll review them in-camera to make those
22 determinations, if necessary. It may be that the response from
23 the SEC is, we don't have anything that is responsive or meets
24 the definitions of the documents requested. And if that's the
25 case, we should know that.

2008.11.03.txt
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4192

8B3ZVIL5

1 But I guess I will order it produced to me at least
2 for in-camera review. And if the SEC wants to articulate why
3 this treads on their deliberative process or other arguments
4 such as privilege, then they can articulate those things.

5 MR. KLEIN: Okay. I mean I think your Honor, the -- I
6 think your Honor well articulated the two issues. The
7 Government's resting on the first point that your Honor made,
8 which is it's our position these are not within the possession,
9 custody or control of the U.S Attorney's Office.

10 THE COURT: I understand that. But if the doctor or
11 FBI Agent steadfastly avoided giving these things to the U.S.
12 Attorney's Office, it doesn't mean that that thwarts 3500,
13 right?

14 MR. KLEIN: I think that's right. And I think that
15 the relationship between the U.S. Attorney's Office and the FBI
16 is a little bit different in the sense that, you know, the FBI
17 agents assist the U.S. Attorney's Office in working on a
18 criminal investigation. And I think that it's -- generally we
19 take the position that anything in the possession of the FBI is
20 deemed to be in our vicarious possession.

21 With respect to the SEC, you know, the offices really
22 do operate independently. And even when they cooperate on the
23 investigations, there are all sorts implicating Rule 6C and
24 otherwise, pursuant to which both offices take significant
25 measures to ensure that they function and operate

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4193

8B3ZVIL5

1 independently.

2 So we perceive the relationship between the U.S.
3 Attorney's Office and the SEC to be unique relative to the
4 offices' relationship with other criminal law enforcement
5 agencies. So that's really the basis on which, pursuant to
6 which we haven't made an effort to obtain these materials.

7 THE COURT: Well I get that, but I don't think the
8 3500 says anything about -- it doesn't carve out an exception
9 to the SEC. It says United States, right?

10 MR. KLEIN: Well, I think that's right. And I was
11 pointing to the Judge Sand decision, which relies on the Judge
12 Lynch decision, which your Honor correctly points out is a
13 civil decision, for the proposition that in circumstances other
14 than in which there is a joint investigation between the SEC
15 and the U.S. Attorney's Office, they are deemed to be separate
16 offices. And what's in the possession, custody and control of
17 one is not deemed to be in the possession, custody and control
18 of the other, absent the circumstances where there's proof that
19 it was a joint investigation. And I would characterize the
20 typical U.S. Attorney office FBI investigation would lead to
21 join investigations, one in which both offices are operating in
22 tandem to conduct a criminal investigation. This is a
23 circumstance that I think is quite different. I think your
24 Honor's absolutely correct, that the statute refers to the
25 United States, but that was the reason for which we were citing

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4194

8B3ZVIL5

1 the Standard and the Judge Sand Rigas decisions.

2008.11.03.txt

2 THE COURT: All right. Well, I think the better
3 course is to make the inquiry of the SEC. Either you can do it
4 as the intermediary or I can do it. I suppose I can issue the
5 order.

6 MR. KLEIN: Okay. I mean, we can make the request.
7 As I said, we would have to make the request of the General
8 Counsel's Office, and we can then in the first instance.

9 THE COURT: You should do it pretty quick.

10 MR. KLEIN: We'll report back to the Court what they
11 tell us.

12 THE COURT: All right. Well, let's -- it's now 2:05.
13 Do you want to take a break and you can make convey that since
14 tomorrow's Election Day, we'll have sometime tomorrow, but I
15 don't know how voluminous these documents are, if there are any
16 documents or how many layers of bureaucracy they need to pass
17 this through.

18 MR. KLEIN: My understanding is that there are
19 e-mails. I don't know whether or not they fall within the
20 scope. I don't know how many layers of bureaucracy we need to
21 go through, but we're attempting to make the request right now
22 via e-mail, your Honor.

23 THE COURT: Okay. Really. Right there, Mr. Litt
24 you're --

25 MR. LITT: Well, I'm searching for the address, but I
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4195

□ 8B3ZVIL5

1 don't have it in this.

2 THE COURT: We can take a minute and do that if you
3 want. I'll give you a break so you can make a phone call.

4 MR. LITT: If I can go downstairs I can do it.

5 THE COURT: Ms. Dubno, did you want to add something?

6 MS. DUBNO: Just one thing for the Court when you're
7 considering, when you're doing your in-camera review. One of
8 the things that we did receive in 3500 which, you know, wasn't
9 much of her actual statements, was a declaration that she had
10 made in the SEC proceeding back in 2005. And there she
11 specifically goes at length into summary account analysis,
12 detailed account transaction analysis. It's clear that at the
13 time she was working with the SEC she was doing a detailed
14 account analysis, which is exactly what the subject matter of
15 her testimony is going to be in this case. And in that
16 situation she was actually -- part of it was citing to the
17 Fraterrigo affidavit which was in the criminal case, and so
18 there's clearly an interrelatedness. So when you're
19 considering those documents, we would just refer you to those
20 pages.

21 THE COURT: All right. Well, I assume the government
22 will make the request, we'll hear the response and we may at
23 least get a broad discussion of -- broad explanation as to what
24 are the responsive documents, if any.

25 MR. KLEIN: Yes, we'll do that.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

4196

□ 8B3ZVIL5

1 THE COURT: All right.

2 MR. KLEIN: If your Honor wants I can do that right
3 now. And to the extent that we run a little bit late, it's
4 Mr. Litt's witness on the stand so the Court can proceed.

5 THE COURT: All right, Mr. Fahringer?

6 MR. FAHRINGER: I was just going to add, your Honor,